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In the Supreme Court of the United States

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RICHARD SHERWOOD WHEETER and
FRANK J. CORSCHEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Middle District of North Carolina, petitioners were convicted of conspiracy to transport, receive, conceal and sell stolen motor vehicles in violation of 18 U.S.C. 371. Petitioner Webster was sentenced to thirty-six months' imprisonment and petitioner Colicchio to fifty-four months' imprisonment, both subject to the parole provisions of 18 U.S.C.

4208(a)(2). The court of appeals affirmed *per curiam*:

The evidence showed that petitioner Colicchio was an independent salesman and dealer in new and used cars in New Jersey. He had been associated with a new car dealership for twelve years prior to May, 1967, the last two years as general manager and stockholder (Tr. 559-560).[1] During this time, Colicchio frequently sold used cars to dealers in the South. One of these dealers was petitioner Webster, who was a used car wholesaler in North Carolina (Tr. 310, 565-566).

Co-conspirator, Trivette, a professional photographer, had dealt with Webster in automobiles for about four or five years. In March 1967 Trivette had purchased through Webster a 1965 Chevrolet without a title subsequently found to have been stolen. Trivette sold the car after driving it for several months. In the early summer of 1967 Webster informed Trivette that he could get a good deal on almost new leased cars from a friend up North (Tr. 383-386, 393-395). Trivette expressed interest in the deal but nothing further developed until August 1967 when Webster came to Trivette's office and telephoned petitioner Colicchio in New Jersey. Colicchio told Trivette that he had a blue Cadillac Eldorado ready to go and could have it down in a few days (Tr. 387).

Colicchio contacted co-conspirator Austin and asked Austin to deliver a stolen 1967 Cadillac to a man in

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[1] "Tr." refers to the trial transcript, a copy of which is being lodged with the Clerk.

North Carolina subsequently identified as Trivette. Colicchio wanted Austin to pick up the money for him because he did not trust the men who were stealing the cars (Tr. 111-112).

A few days later in September or October 1967, Austin went to Wilmington, North Carolina and met the man who had driven the stolen Cadillac down. Before the car was delivered, Colicchio told Trivette by telephone not to talk to the men delivering the car, but just to go ahead and get the title for it. Austin and the other man then delivered the car to Trivette (Tr. 113, 127, 387-388). Trivette gave Austin $2500 for the car and $200 for travel expenses. The men gave Trivette a New York registration certificate for the car and a bill of sale, which Austin had signed with a fictitious name showing a sale price of $6500 (Tr. 113-117, 388-389). The following evening, Austin delivered the money, less his $500 cut, to Colicchio in New Jersey (Tr. 118).

Trivette had asked Webster to arrange for a Buick Electra for Trivette's wife, and had given Webster a $1600 down payment on the price of $2500. About a week after the delivery of the first Cadillac, Colicchio telephoned Trivette and told him that the Buick had been sent the wrong way and agreed to send a Cadillac for the same price (Tr. 390). Colicchio again contacted Austin to pick up and deliver the Cadillac as a replacement car to "his man Dick" (Webster) in North Carolina (Tr. 119, 172, 390). Austin contacted Trivette on his arrival in North Carolina the following Sunday and subsequently Trivette went to pick up the car, a 1967 Cadillac four door, accom-

panied by Webster. Webster told Trivette that Colicchio had said that the money was to be paid to Webster rather than the men delivering the car. Trivette paid Webster the balance of the $2500 price and gave Austin a couple of hundred dollars for transportation (Tr. 120-122, 391). Trivette's wife drove this car for several months and it was then sold through co-conspirator Beamer to one Morris. The title application and bill of sale for the car were filled out by co-conspirator Temples who inserted a price of $4850 based on the retail value of the car (Tr. 220-229).

After the second car had been delivered, Austin suggested to Trivette that he could supply Trivette with cars from the same source for less money and suggested cutting out Colicchio. Trivette agreed and thereafter Austin dealt directly with the people in New York who stole the cars and no more cars came through Colicchio (Tr. 121-125, 168-171, 398).

Another 1967 Cadillac convertible was delivered to Trivette's house around September 1967 and sold to co-conspirator Beamer. Webster had Trivette send a man over to sign a fictitious name to the bill of sale (Tr. 392-393, 475-476). Beamer had the title application prepared by co-consiprator Temples for $300 (Tr. 214-219).

Subsequent to the conversation about cutting out Colicchio, more than ten other stolen cars were delivered from the New York area by Austin and others to Trivette and Temples (Tr. 56-82, 104-107, 126-140, 175). At Webster's suggestion, Trivette arranged to have Temples fill out the paperwork on most of these

cars, inserting prices in the applications and bills of sale based on the retail value, although the actual prices were often several thousand dollars below retail (Tr. 220-255, 399). The cars were sold in North Carolina through a group of co-conspirators including Trivette, Temples, Beamer and Renn. This activity continued until about May 1968 when the FBI investigation began.

1. Petitioners contend that the evidence was not sufficient to show an agreement on their part to engage in the transportation and sale of stolen automobiles, and that if an agreement did exist, it pertained only to two cars and was not part of the overall, continuous conspiracy. The sufficiency of the evidence to establish the existence of an agreement was, however, a question of fact decided against petitioners by the jury on proper instructions, and there is no reason to disturb that finding. The scope of the conspiracy must have been known by petitioners even though the number or identities of all the other conspirators may not have been known. The jury was repeatedly instructed that an agreement was the gist of the offense.

The existence of a single conspiracy or multiple conspiracies is a fact question for the jury, on proper instructions, based on the nature of the agreement. *United States* v. *Varelli*, 407 F.2d 735, 746 (C.A. 7); *United States* v. *Crosby*, 294 F. 2d 928, 945 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984. Here, the jury was instructed that "proof showing different and disconnected smaller conspiracies will not sustain a conviction" (Tr. 748). Petitioners requested no instruc-

tion on separate conspiracies and there were no objections to the trial judge's charge.

From the evidence, the jury could find one continuous conspiracy (in which some parties had larger parts than others) to transport and sell stolen automobiles. *Blumenthal* v. *United States*, 332 U.S. 539, 558-559; *United States* v. *Nasse*, 432 F. 2d 1293 (C.A. 7), certiorari denied, 401 U.S. 938.

2. Petitioners' contention that they were denied a fair trial because they were limited to the joint exercise of ten peremptory challenges is without substance. There is no suggestion in the record, and no showing by petitioners, that the jury was not fair and impartial. This is the limit established by Rule 24(b), F.R.Crim.P., and the exercise of the court's discretion in refusing to grant additional peremptory challenges was proper. *United States* v. *Crutcher*, 405 F. 2d 239, 245 (C.A. 2), certiorari denied, 394 U.S. 908.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST, 1971.

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